IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
PRESIDING JUDGE RICHARD ALLEN GRIFFIN

GARY and KATHY HENRY, et al.

Plaintiffs-Appellees,

vs.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Supreme Court No. 125205

Court of Appeals No. 251234

Saginaw County Circuit Court
Case No. 03-47775-NZ

REPLY BRIEF OF DEFENDANT-APPELLANT THE DOW CHEMICAL COMPANY

ORAL ARGUMENT REQUESTED

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Plaintiffs confirm that their request for medical monitoring where there is no manifest physical injury would require this Court to dramatically depart from Michigan common law and to engage in the legislative exercise of policymaking. Conceding that no Michigan precedent supports their claim for medical monitoring absent a manifest physical injury, Plaintiffs instead argue that "[n]othing in Michigan law bars a medical monitoring claim." (Pls' Br at 9). However, this simplistic position ignores both well-established Michigan precedent and this Court's traditional deference to the legislature in the creation of new theories of recovery. Likewise, Plaintiffs' attempt to avoid this Court's consistent requirement of manifest physical injury by characterizing their claim as one for "equitable relief" fails to show what impact the ***remedy*** they seek would have upon the elements of their claim. The policy concerns with Plaintiffs' speculative cause of action would remain exactly the same no matter whether their relief would require Dow to pay future expenses directly to Plaintiffs or to a trust operated on their behalf. Ultimately, Plaintiffs' request that this Court abandon prior precedent because medical monitoring "is a legal concept necessitated by changes in society and advances in medical science" (*Id* at 26) only confirms that adopting a claim for medical monitoring where no identifiable, physical injury is alleged presents broad and complex issues that are far better suited for the legislative arena.

I. PLAINTIFFS PROVIDE NO BASIS FOR THIS COURT TO ADOPT A MEDICAL MONITORING CLAIM WHERE THE PLAINTIFF HAS NOT PLED A PRESENT COGNIZABLE INJURY

A. Plaintiffs Concede There Is No Basis Under Michigan Law To Recognize A No-Manifest-Injury "Medical Monitoring" Claim.

Plaintiffs cannot dispute that Michigan precedent has never recognized a medical monitoring claim (or any analogous tort claim) absent a manifest physical injury. Rather, Plaintiffs seek to rationalize their departure from Michigan law by arguing that "[n]othing in

Michigan law, whether common law or statute, precludes this Court from recognizing an equitable claim for medical monitoring." (Pls' Br at 8; *see, eg, id* at 15, 16). However, Plaintiffs do not dispute that, in accordance with traditional tort principles, this Court consistently has required the pleading and proof of a manifest physical injury for recovery in tort. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001); *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 311, 319; 399 NW2d 1 (1986); *Bogaerts v Multiplex Home Corp of Mich*, 423 Mich 851; 376 NW2d 113 (1985). Instead, Plaintiffs rely on the unremarkable proposition that a plaintiff may recover for emotional distress or future damages where the plaintiff can prove a current physical injury. (Pls' Br at 28) (emotional distress claims "all require some type of physical manifestation"; an enhanced risk claim "requires a showing that the future injury will result with reasonable certainty ***from a current physical injury***") (emphasis added); *see, eg, Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970); *Prince v Lott*, 369 Mich 606, 609; 120 NW2d 780 (1963). In an effort to distinguish these cases, Plaintiffs assert that "the physical injury is not the compensable harm." (Pls' Br at 27). However, Plaintiffs do not dispute that this case law requires that the plaintiff allege a "definite and objective physical injury" prior to seeking compensation for "non-physical harm."[1]

Plaintiffs seek to minimize their departure from this bedrock principle by substituting the requirement of a manifest physical injury with the novel injury: "the invasion of their interest in being free from the economic burden of extraordinary medical surveillance." (Pls' Br at 26).

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[1] Plaintiffs erroneously assert that a federal district court "concluded that Michigan would recognize a state law claim for medical monitoring." (*See* Pls' Br at 8, 16) (*citing Gasperoni v Metabolife, Int'l Inc*, 2000 WL 33365948 (ED Mich Sept 27, 2000)). *Gasperoni*, however, is a federal class certification opinion that never addresses whether a medical monitoring action exists under Michigan law. *Id* at *7. Instead of challenging the existence of a medical monitoring action, the defendants argued that such a claim would not be amenable to class treatment because it sought personal injury-type damages. *Id.*

However, Plaintiffs tellingly rely only upon a handful of decisions expanding the laws of other jurisdictions to adopt a medical monitoring claim. Neither the Plaintiffs nor the decisions they cite explain why avoiding the potential "economic burden" of future medical monitoring should constitute a "legally protected interest." Instead, these decisions simply created such a legal interest by judicial fiat. *See, eg, In re Paoli*, 916 F2d 829, 849-51 (3d Cir 1990). In accordance with these judicial pronouncements, Plaintiffs refashion their remedy (*ie*, "economic burden," "cost of the specialized medical examinations") as an "injury" by adding the prefix, "interest in being free from." (Pls' Br at 26-28). But under this tautological exercise, any remedy (*eg*, emotional distress) may be redefined as an "injury." (*See* Def's Br at 23).

Plaintiffs cannot hide the fact that what they demand is a tectonic shift in Michigan tort law that would permit a tort action "before the consequences of a plaintiff's exposure are manifest" for the purpose of "mitigate[ing] future illness." (Pls' Br at 20-21; *id* at 30 (Plaintiffs seek "to detect and minimize future damages through medical monitoring")). They provide no meaningful distinction between their proposed claim and the claims based on "exposure" or "enhanced risk" that this Court has not recognized. *Eg, Larson*, 427 Mich at 311, 317.

B. Plaintiffs' Characterization Of Their Claim As Equitable Relief Provides No Basis To Abandon The Requirement Of A Present Physical Injury.

Unable to distinguish this Court's precedent, Plaintiffs contend that this fundamental principle would not apply because they characterize their claim as one for equitable rather than monetary relief. (Pls' Br at 10-11, 22, 29-30, 31, 32, 43-44). However, even if Plaintiffs' claim was one for equitable relief (which it is not), Michigan law still requires an allegation of a manifest physical injury. (Def's Br at 26-27). Plaintiffs contend that tort principles do not apply because, by analogy, a preliminary injunction requires only proof that an irreparable injury will

occur if no injunction is issued.[2] (Pls' Br at 33). The preliminary injunction seeks to preserve the status quo so that the plaintiff suffers no greater injury during the pendency of the proceeding. Under no circumstances, however, does such a remedy excuse the plaintiff from pleading an underlying injury in the first place. The claimant still must successfully demonstrate an underlying cause of action, including the element of injury, to obtain his equitable remedy. *Wood v Wyeth-Ayerst Labs*, 82 SW3d 849, 855 (Ky 2002) ("It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy."). That is why before a plaintiff may obtain a preliminary injunction, he must demonstrate that he is likely to prevail on the merits of an underlying cause of action.[3] *See, eg, Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-58; 365 NW2d 93 (1984).

Accordingly, no matter whether the relief sought is monetary or equitable, the plaintiff must allege a legally cognizable injury. *See Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001) (to seek injunctive relief, the plaintiff must have suffered an injury in fact which is concrete, particularized and actual or imminent, not conjectural or

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[2] In their *amicus curiae* brief, the Ecology Center likewise argues that "tort principles" should not apply to equitable relief because "it is sufficient to demonstrate that 'the applicant will suffer irreparable injury' absent a preliminary injunction." *See* Ecology Ctr Br at 21.

[3] Each decision cited by Plaintiffs or the Ecology Center addressed preliminary injunctive relief in an action alleging a contractual or statutory injury. *See Michigan State Employees*, 421 Mich at 155 (injunction sought pending wrongful discharge claim for dismissal); *L&L Concession Co v Goldhar-Zimner Theatre Enterprises*, 332 Mich 382, 385-86, 388; 51 NW2d 918 (1952) (temporary injunction sought pursuant to plaintiff's rights under sublease to stop eviction proceedings pending resolution of parties' rights under leases); *Steggles v National Discount Corp*, 326 Mich 44; 39 NW2d 237 (1949) (preliminary injunction returning car pending action over title to car following defendant's fraudulent repossession); *Gates v Detroit & M Ry Co*, 151 Mich 548; 115 NW 420 (1908) (preliminary injunction requiring railroad to continue delivering plaintiff's product pending plaintiff's action alleging breach of contract); *Van Buren Public School Dist v Wayne County Cir Judge*, 61 Mich App 6, 12-14; 232 NW2d 278 (1975) (preliminary injunction sought pending state commission's resolution of charges for unfair labor practices).

hypothetical). As Plaintiffs concede, the plaintiff must demonstrate that denial of the preliminary injunction "***will*** result in irreparable harm." (Pls' Br at 33) (emphasis added); *eg, Michigan State Employees*, 421 Mich at 158. Where Michigan permits injunctive relief based on the threat of injury, the plaintiff must show "there exists a real and imminent danger of irreparable injury." *Acer Paradise, Inc v Kalkaska County Road Comm'n*, 262 Mich App 193; 684 NW2d 903 (2004); *see, eg, Fenestra Inc v Gulf American Land Corp*, 377 Mich 565, 601-02, 608; 141 NW2d 36 (1966). "The injury must be both certain and great, and it must be actual rather than theoretical."[4] *Thermatool Corp v Borzym*, 227 Mich App 366, 377; 575 NW2d 334 (1998). For example, the Michigan Court of Appeals recently applied this distinction in the course of refusing to issue an injunction requiring the repair and care of a bridge:

> plaintiff's complaint does not assert that the Iron Bridge is currently in danger of immediately collapsing; rather, the complaint simply alleges that the bridge may eventually collapse. This is not the type of imminent danger of irreparable injury required for an injunction.

Acer Paradise, 684 NW2d at 910. Likewise, Plaintiffs here do not allege that they ***will*** sustain a disease or illness as a result of dioxin exposure at all, let alone imminently. Rather, they contend that they ***may*** potentially be at an increased risk of some day possibly developing any number of "latent" conditions.

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[4] Plaintiffs' and the Ecology Center's citations are not to the contrary. In *Michigan Coalition of State Employee Unions v Michigan Civil Service Comm'n*, this Court clarified that, to obtain a preliminary injunction, the plaintiff must prove that "it ***will*** otherwise ***imminently suffer irreparable harm***." 465 Mich 212, 228; 634 NW2d 692 (2001) (emphasis added). Accordingly, it vacated the preliminary injunction under review. *Id.* None of the Plaintiffs' or Ecology Center's remaining citations addressed claims based solely on future injuries. *See, eg, Michigan State Employees*, 421 Mich at 167 (addressing only "whether the injuries alleged rise to the level of irreparable injury supporting issuance of a preliminary injunction in public employee discharge cases"). In each case, the injunction was sought based upon some alleged legal injury that was not merely certain, but had allegedly occurred. *See, eg, id* at 155 (plaintiff was dismissed from work); *Gates*, 151 Mich at 550-51 (defendant railroad refused to deliver plaintiff's product to mill in alleged violation of contract).

Moreover, Plaintiffs do not seek equitable relief. The fact that Plaintiffs demand that Dow pay into a fund for future, rather than incurred, expenses merely reflects the nature of the damages alleged – compensation for future damages. Numerous courts have recognized that, even where plaintiffs fashion their medical monitoring claim as seeking payment into a court-supervised fund, the claim remains essentially an action for monetary damages.[5] Even the Court of Appeals' now-vacated *Meyerhoff* decision determined that "medical monitoring expenses are a compensable item of damages." *Meyerhoff v Turner Constr Co*, 202 Mich App 499, 505; 509 NW2d 847 (1993). Similarly, in *Taylor v American Tobacco Co*, 2000 WL 34159708, at *12 (Mich Cir Ct Jan 10, 2000), where the plaintiffs purported to seek medical monitoring in the form of injunctive relief, the circuit court rejected the supposed claim as involving anything more than monetary relief.

Despite Plaintiffs' repeated mantra that this is a claim for equitable relief only, Plaintiffs' pleadings and submissions further contradict that position. In their Complaint, Plaintiffs demand that Dow "fund" Plaintiffs' future expenses.[6] In their Response, Plaintiffs continue to describe the gravamen of their claim as the payment of monies by Dow: "if Dow . . . . put Plaintiffs in a position of enhanced risk of injury, then Dow should pay for the diagnostic testing . . . ." (Pls'

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[5] *See, eg, Jaffe v United States*, 592 F2d 712, 715 (3d Cir 1979) ("A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money."); *Thomas v FAG Bearings Corp*, 846 F Supp 1400, 1405 (WD Mo 1994) (rejecting argument that medical monitoring action was equitable because such relief is "nothing more than compensation for necessary medical expenses reasonably anticipated to be incurred in the future").

[6] *See* Compl at ¶¶ 216, 217: 272a, 273a; Pls' Opp Br at p 12: 148a (arguing that "companies like Dow . . . . should be responsible for paying the associated costs of medical monitoring"); Pls' App Br at p 12: 394a (arguing that "Dow . . . be held responsible and be required to pay").

Br at 9) (emphasis added).[7] When analyzing their claim, Plaintiffs characterize their "injury" as the "economic burden" or "cost of the specialized medical care." (Pls' Br at 26). Not surprisingly, the trial court likewise recognized Plaintiffs' medical monitoring claim as seeking monetary relief when it denied Dow's motion for summary disposition in order to provide Plaintiffs "an opportunity to create a record regarding medical monitoring damages." (8/18/2003 Order at 4: 160a).

II. PLAINTIFFS' RESPONSE CONFIRMS THAT ANY NEW CLAIM FOR MEDICAL MONITORING SHOULD BE LEFT TO THE LEGISLATURE.

In the face of the dramatic departure from Michigan tort law that their medical monitoring claim would entail, Plaintiffs argue that "[n]ew causes of action are constantly created." (Pls' Br at 14). There may be no dispute over this Court's constitutional authority to recognize new causes of action in exceptional circumstances, but Plaintiffs have failed to demonstrate that this Court should abandon a bedrock principle of common law here and open Michigan courts to speculative and uncertain claims. Plaintiffs' characterization of the common law as "ever changing to keep pace with society's progress and challenges" ignores the Court's constitutional role to "ascertain[] existing rights." *In re Manufacturer's Freight Forwarding Co*, 294 Mich 57, 63; 292 NW 678 (1940). Contrary to Plaintiffs' view, courts do not simply abandon well-established common-law principles whenever they feel that "the common-law rule no longer fits the social realities of the present day." (Pls' Br at 15). Although this Court can and has extended legal claims to new plaintiffs in rare circumstances, it also has clarified that the creation of a new legal claim that "involves a variety of complex social policy considerations" is

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[7] *See, eg*, Pls' Br at 4-5 (seeking program "that will supervise ***and pay*** for medical screening"), 10-11 (Plaintiffs seek program "to supervise ***and fund*** the medical monitoring regime"), 11 (under proposed claim, "Dow . . . ***would fund*** the program"), 13 (the proposed program "would be ***paid by Dow*** through a court-administered ***fund***"), 33 ("Essentially, Plaintiffs seek ***to have Dow pay*** into a court-supervised fund . . .") (emphasis added to each).

more appropriately deferred to the legislature. *Eg, Sizemore v Smock*, 430 Mich 283, 299; 422 NW2d 666 (1988). Plaintiffs' Response confirms that adopting their novel claim would involve precisely such considerations.

Plaintiffs admit that, "[a]s with all new causes of action, medical monitoring raises public policy concerns." (Pls' Br at 19). In fact, their entire argument revolves around free-floating and speculative policy considerations. For example, without citation, Plaintiffs contend that "the human, social, and economic costs of serious disease and adverse health effects may be reduced significantly" and the "overall costs to both defendants like Dow and to society at large . . . are reduced." (*Id* at 20, 21). As Dow explained in its opening brief, the United States Supreme Court, among others, has recognized that there is no scientific consensus as to the appropriate medical regime, if any, to monitor for particular conditions.[8] *Metro-North Commuter RR Co v Buckley*, 521 US 424, 441-42 (1997). Nor is it at all clear whether creating this new claim would properly allocate scarce medical resources. *Id* at 442. On the contrary, Plaintiffs' novel extension of Michigan law would open the courts to speculative and unreliable claims that would further exhaust judicial resources and absorb scarce medical resources.[9] *Id.*

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[8] *See also* Report of US Preventive Services Task Force, Guide to Clinical Preventive Services at xliv - xlvi (Williams & Wilkins 2d ed 1996): 683a-685a.

[9] Plaintiffs' proposed criteria only ensure that adopting their medical monitoring claim would invite a flood of speculative claims. Plaintiffs suggest that this Court merely require pleading and proof of "probable exposure"; that is, "contaminant levels ***in the environment*** pose a ***high likelihood or reasonable certainty of environmental exposure*** to a hazardous substance and subsequent adverse health outcomes," depending on the factor of the "***probability*** and extent ***of the plaintiff's exposure***." (Pls' Br at 11) (emphasis added). (*See also id* at 12 (Criterion No. 2 requiring that a "well-defined, identifiable target population of concern has a ***probability of exposure*** to the hazardous substance"), 30 ("In the medical monitoring case, ***probable exposure*** . . . is the key.")) (emphasis added). In addition, Plaintiffs dilute the already nebulous element of "an increased risk" for "serious latent disease," requiring instead only evidence for a "reasonable association" between the probable exposure and "specific adverse health effect[s]." (*Id* at 12).

Plaintiffs respond that their medical monitoring claim would be no more speculative than other Michigan tort actions. Tellingly, in comparison, Plaintiffs raise only the controversial cause of action for enhanced risk, which Michigan has not adopted; Michigan instead requires proof of a present injury to recover future damages, and only those damages that are reasonably certain. *Prince*, 369 Mich at 609 (to recover future damages, "there must be such a degree of probability of such consequences to amount to a reasonable certainty that they will result ***from the original injury***") (emphasis added). A medical monitoring claim would in fact compound the speculation already inherent in an action for enhanced risk. Not only would proof of a need for medical monitoring depend upon the same dubious assessment of the probability of a future injury, but the claim in turn would further rely upon this same uncertain assessment to further speculate as to what medical examination, if any, would be useful to prevent the theoretical future injury. *See Buckley*, 521 US at 441-42.

Finally, Plaintiffs argue that this Court should recognize their medical monitoring claim in light of Michigan environmental legislation providing for the monitoring of employees and contaminated water or property under certain circumstances. (Pls' Br at 16-21). Contrary to Plaintiffs' insinuation, however, nothing in this legislation mandates that the Court "create other causes of action and remedies" or adopt and develop new rights under the common law akin to "a right of privacy."[10] Rather, Plaintiffs' statutory citations illustrate the Legislature's extensive involvement in the field of environmental protection by enacting a detailed statutory framework and civil remedies for violations of certain statutory provisions. The fact that the Legislature has

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[10] *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16; 576 NW2d 641 (1998) and *Ray v Mason County Darin Comm'r*, 393 Mich 294; 224 NW2d 883 (1975) each addressed the development of standards underlying a specific statutory right of action under MEPA, not at issue here, to enforce environmental regulations protecting the air, water and other natural resources. The Court did not address, let alone sanction, the creation of new common law claims.

authorized regulations and standards for monitoring certain employees and property reflects that the Legislature already has determined where and when monitoring is required, not that this Court should create a new and distinct common law claim on behalf of a broad class of uninjured individuals. *See Beaudrie v Henderson*, 465 Mich 124, 140; 631 NW2d 308 (2001).

III. CONCLUSION

Dow requests this Court to directly dismiss as a matter of law Plaintiffs' medical monitoring claims.

Respectfully submitted,

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